457

Dec. 8/66 Reversed

Fred Mitchell

SUPREME COURT OF THE UNITED STATES.

No. ~~200~~ 457.

THE UNITED STATES, PLAINTIFFS IN ERROR,

vs.

GEORGE N. STEWART.

IN ERROR TO THE CIRCUIT COURT U. S. FOR THE SOUTHERN DISTRICT OF ALABAMA.

G. S. GIDEON, Printer, 511 Ninth street, Washington, D. C.

SUPREME COURT OF THE UNITED STATES.

No. 209.

THE UNITED STATES, PLAINTIFFS IN ERROR,

vs.

GEORGE N. STEWART.

IN ERROR TO THE CIRCUIT COURT U. S. FOR THE SOUTHERN DISTRICT OF ALABAMA.

INDEX.

	Original.	Print.
Capias	2	1
Marshal's return	4	2
Declaration	4	2
Continuance	8	3
Demurrer to declaration	8	3
Order leave to amend declaration	9	4
Amended declaration	10	4
Order of continuance	21	8
Order allowing to 1st June to plead or demur	21	8
Plea oyer of bond, &c	21	8
Demurrer	24	9
Order allowing amendment	25	10
Plea and prayer for oyer of bond	26	10
Demurrer	29	11
Plea filed on overruling demurrer	31	12
Plea No. 2 do.	37	14
Plea No. 3 do.	37	14
Demurrer to foregoing pleas	40	15
Joinder in demurrer	43	16
Replication to second plea	43	16
Replication to third plea	44	17
Rejoinder to replication to third plea	46	17
Orders as to pleadings	47	17

GIDEON, Print.

	Original.	Print.
Orders as to pleadings	48	18
Order on trial	49	18
1st jury and verdict	49	18
Writ of error prayed	49	18
Case redocketed from Supreme Court United States under a mandate	50	18
Verdict and judgment for plaintiff, April term, 1857	51	19
Motion to allow time to petition for a new trial	52	19
Order granting said motion	53	19
Petition for new trial and to stay execution	53	20
Order of judge allowing same	55	20
Motion to set aside verdict, &c	56	21
Order granting same	56	21
Venire de novo awarded	57	21
Second verdict and judgment for defendant	57, 58	21
Bills of exceptions filed by United States	59	22
Exhibits referred to in same, viz:		
Bond A of O. S. Beers	60	22
Memorandum on same	63	23
Treasury transcripts marked B	66 to 70	25
Writing signed by Stewart and Le Baron, marked C	71	32
Bill of exceptions continued	72 to 78	32
Endorsement on same	78	34
Writ of error	78	34
Citation in error	80	35
Marshal's return	81	35
Clerk's certificate	82	35

THE UNITED STATES OF AMERICA.

Circuit Court of the United States for the fifth judicial circuit and southern district of Alabama.

Pleas had before the honorable the circuit court of the United States for the fifth judicial circuit and southern district of Alabama, at a term thereof begun and held in and for said district, at Mobile, on the fourth Monday of December, in the year of our Lord one thousand eight hundred and fifty-seven, before the honorable John Gayle, judge of said court, presiding.

THE UNITED STATES OF AMERICA
vs. } 3,260.
GEORGE N. STEWART.

Be it remembered, that heretofore, to wit, on the fourteenth day of March, in the year of our Lord one thousand eight hundred and fifty-three, the plaintiffs sued out of said court a writ of capias ad respondendum against defendant, in the words and figures following, to wit:

Writ of Capias Ad Res.

UNITED STATES OF AMERICA.

Circuit Court of the United States for the fifth judicial circuit and southern district of Alabama.

The President of the United States to the marshal of said district, greeting:

You are hereby commanded to take the body of George N. Stewart, who is a citizen of the State of Alabama, and him safely keep, so that you have him before the hon. the circuit court aforesaid, at the place of holding said court at Mobile, on the second Monday of April next, to answer unto the United States of America in a plea, that he render to the United States of America the sum of twenty thousand dollars, which he owes to and unjustly detains from the United States of America, to the damage of the United States of America of thirty thousand dollars. Herein fail not, and have you then and there this writ.

Witness the Hon. Roger B. Taney, Chief Justice of the Supreme [L. S.] Court of the United States, and the seal of said circuit court, this fourth Monday of December, in the year of our Lord one thousand eight hundred and fifty-two.

Issued the fourteenth day of March, in the year of our Lord one thousand eight hundred and fifty-three.

Attest: JOHN FITTS,
Clerk C. C. Southern Dist. of Ala.

[REC. CCIX D. T., 1858.]—1

Cause of Action.

This action is founded on a joint and several bond for the sum of twenty thousand dollars, made by Oliver S. Beers, Charles Le Baron and the defendant, dated 1st July, 1850, and payable to the United States of America, with a condition annexed to the effect that the said Oliver S. Beers, as deputy postmaster at Mobile, should well and truly execute the duties of said office according to law and the instructions of the Postmaster General, and account for and pay over all moneys which should come to his hands as such; which condition has been broken by the failure of the said Beers well and truly to execute the duties of said office, and account for and pay over such moneys.

HOPKINS, JONES & LOMAX,
Plff's Att'ys.

Marshal's Return.

Received 14th March, 1853, and on same day executed this writ on defendant and gave him a copy.

CHAS. BINGHAM,
U. S. Marshal.
By H. WARFIELD,
Deputy.

And on the 13 day of April, 1853, the same being a day of the April term of said court, begun and held on the second Monday of April, A. D. 1853, the plaintiffs filed in said court a declaration, in the words and figures following, to wit:

Declaration.

UNITED STATES OF AMERICA.

Circuit Court U. S., fifth judicial circuit and southern district of Alabama.—April Term, A. D. 1853.

George N. Stewart, a citizen of the State of Alabama, was attached to answer to the United States of America in a plea of debt, &c., &c.; whereupon the said United States of America, by P. Phillips, their attorney, complain of said George N. Stewart, that Oliver S. Beers having been duly appointed deputy postmaster of the city of Mobile, in the county of Mobile and State aforesaid, the said defendant, as surety for the said Oliver S. Beers, heretofore, to wit, on the first day of July, A. D. 1850, at Mobile aforesaid, and within the jurisdiction of this court, by his certain writing obligatory, sealed with his seal, and now here shown to the court, the date whereof is the day and year aforesaid, acknowledged himself to be held and firmly bound unto the United States of America in the sum of twenty thousand dollars above demanded.

Which said writing obligatory was and is subject to a certain condition thereunder written, whereby said Oliver S. Beers, as dep-

uty postmaster aforesaid, undertook and agreed well and truly to execute the duties of said office; and among other things the said Oliver S. Beers agreed to pay the balance of all moneys that should come to his hands for the postage of whatever is by law chargeable with , in the manner prescribed by the Postmaster General of the United States for the time being; and also to do and perform, as agent for the Post Office Department, all such acts and things as may be required of him by the Postmaster General; and moreover, faithfully to account with the United States, in the manner directed by said Postmaster General, for all moneys, bills, bonds, notes, receipts, and other vouchers which he, as agent as aforesaid, shall receive for the use and benefit of said Post Office Department.

And the plaintiff avers that the said Oliver S. Beers, as postmaster aforesaid, has come into the possession and receipt of large sums of money for postage and post office dues; that there is due and owing to the pl'ff a large balance on this account; and that the said Oliver S. Beers has failed to comply with the condition of said writing obligatory aforesaid, by refusing, on the demand of said Postmaster General, to pay over the said balance and to account for the same.

By reason of which breach the said writing obligatory has become forfeited, whereby an action hath accrued to said plaintiff to demand and have of and from George N. Stewart, surety as aforesaid and defendant herein, the sum of twenty thousand dollars.

Yet the said defendant hath not paid the said sum, although often requested so to do; but to pay the same has hitherto wholly refused, to the damage of said plaintiff thirty thousand dollars.

PHILLIPS,
Att'y for Pl'ff.

And on the 13th day of April, 1853, the same being a day of the April term of said court, begun and held on the second Monday in April, A. D. 1853, the following order was made in this cause:

Continuance.

THE UNITED STATES
vs.
GEORGE N. STEWART.

It is ordered by the court that this cause be continued.

Demurrer.

THE UNITED STATES
vs.
GEORGE N. STEWART.

Southern district of Alabama, Circuit Court of the United States.—April Term, 1853.

And the said defendant, by his attorneys, comes and defends the

wrong and injury, when, &c., and saith that the said declaration and the matters and things therein set forth are not sufficient in law to entitle the said plaintiffs to have and maintain their aforesaid action against him, the said defendant, in this behalf, and that he, the said defendant, is not bound by the law of the land to answer thereto; wherefore, for want of a sufficient declaration in this behalf, the said defendant prays judgment of said declaration, &c.

STEWART & EASTON,
Atty's for Deft.

Filed 18th April, 1853.

JOHN FITTS, *Clerk.*

And on the 9th day of January, 1854, the same being a day of the December term of said court, begun and held on the fourth Monday of December, A. D. 1853, the following order was made and entered in this cause:

Order allowing Amendment.

THE UNITED STATES
vs.
GEORGE N. STEWART.

This day came the parties, by their attorneys, and thereupon came on to be heard the demurrer of the defendant to the plaintiff's declaration filed herein, and after the argument of counsel, as well in support of as against the same, it is considered by the court that the demurrer be sustained; and thereupon, on motion of the plaintiffs, by their counsel, for this purpose, they are permitted to amend their declaration in this behalf, and the said cause is continued until the next term of this court.

And afterwards, to wit, on the 18th day of April, 1854, the same being a day of the April term of said court, begun and held on the second Monday of April, 1854, the plaintiffs filed an amended declaration, in these words and figures following:

Amended Declaration.

UNITED STATES OF AMERICA.

Circuit Court U. S., fifth judicial circuit and southern district of Alabama.—April Term, 1854.

George N. Stewart, a citizen of the State of Alabama, was attached to answer to the United States of America in a plea of debt, &c., &c.; whereupon the said United States of America, plaintiffs, by Manning & Walker, attorneys, complain of the said George N. Stewart of a plea, that he render unto them the sum of twenty thousand dollars which to them, the said plaintiffs, he owes, &c.

For that whereas heretofore, to wit, on the first day of July, in the year of our Lord eighteen hundred and fifty, at Mobile, to wit, in the State aforesaid, and within the jurisdiction of this court,

the said George N. Stewart by his certain writing obligatory, sealed with his seal, and now here to the court shown, jointly and severally with other persons not proceeded against in this suit, acknowledged himself to be held and firmly bound unto the said United States in the sum of twenty thousand dollars to be to them paid; which said writing obligatory was and is subject to a certain condition thereunder written, whereby, after reciting that one Oliver S. Beers was deputy postmaster at Mobile, in the said State of Alabama, it was provided that in case the said Oliver should well and truly execute the duties of said office of deputy postmaster according to law and the instructions of the Postmaster General, and should faithfully once in three months, and oftener if required, render accounts of his receipts and expenditures as deputy postmaster to the Post Office Department in the manner and form prescribed by the Postmaster General in his several instructions to postmasters, and should pay the balance of all moneys that should come to his hands for the postage of whatever was by law chargeable with postage in the manner prescribed by the Postmaster General of the United States for the time being; and should safely keep, without loaning, using, depositing in bank, or exchanging for other funds than as allowed by law, all the public money collected by him, or otherwise at any time placed in his possession and custody till the same should be ordered by the Postmaster General to be transferred or paid out, and when such orders for transfer or payment should be received should faithfully and promptly make the same as directed; and should also faithfully do and perform as agent and depository for the Post Office Department all such acts and things as might be required of him by the Postmaster General; and should, moreover, faithfully account with the United States in the manner directed by the Postmaster General for all moneys, bills, bonds, drafts, receipts, and other vouchers, which he, as agent and depository as aforesaid, should receive for the use and benefit of the said Post Office Department, then and in that case the said writing obligatory should become void.

And the plaintiffs aver that the said Oliver did not well and truly execute the duties of his said office according to law and the instructions of the Postmaster General.

1. And the plaintiffs assign for breach of said condition, that while said Oliver S. Beers was deputy postmaster as aforesaid, under said writing obligatory, and after the making and delivery thereof, to wit, on the 10th day of July aforesaid, and divers other days before the commencement of this suit at, to wit, his office, in the district aforesaid, he, the said Oliver, as such deputy postmaster, and according to law, received divers large sums of money for postage, and other moneys properly payable and paid to him as such deputy postmaster, for and on account of said plaintiffs—that is to

say, sums amounting together to fifty-one thousand and seventy-five dollars and twenty-five cents, and that there is now due and owing from him, on account of said moneys, to the plaintiffs a large balance, to wit, a balance of *of* twenty thousand five hundred and forty-three dollars and fifty-two cents; which balance the said Oliver hath wholly failed and refused, and still neglects and refuses to pay, although the same was duly demanded of him under the directions of the Postmaster General aforesaid, and on behalf of plaintiffs, to wit, on the day of February, in the year 1853, at Mobile, to wit, in the district aforesaid.

2. And for a further assignment of a breach of the said condition, the plaintiffs further say, that the said Oliver S. Beers, while he was deputy postmaster as aforesaid, under the said writing obligatory, and after the making and delivery thereof, did not safely keep without using or loaning the public money collected by him, or that otherwise and according to law came to his possession or custody during that , but that, on the contrary, he took and converted to his own use, to wit, on the 10th day of July, in the year 1850, and on divers other days before the commencement of this suit, to wit, at his office, in the district aforesaid, a large other sum of such public money belonging to plaintiffs, to wit, the further sum of twenty thousand six hundred and seventy-three dollars and sixty-one cents, which had theretofore been collected by him as such deputy postmaster, or otherwise according to law been placed in his possession and custody as such deputy posmaster at, to wit, his office, in the district aforesaid, whereby the last mentioned sum of money has been lost to the plaintiffs.

3. And for a further assignment of a breach of the said condition, the said plaintiffs say that the said Oliver, while he was deputy postmaster as aforesaid, and as such was the agent and depositary for the Post Office Department, as in said condition mentioned, after the making and delivery of said writing obligatory, and under the same, to wit, on the 10th day of July, in the year 1850, and on divers other days before the commencement of this suit, to wit, at his office, in the district aforesaid, received for the use and benefit of the said Post Office Department, according to law, divers other large sums of money, to wit, the sum of twenty thousand dollars, and has failed to account therefor with the United States aforesaid, in the manner directed by the Postmaster General.

4. And for a further assignment of a breach of said condition, the plaintiffs say, that while the said Oliver was deputy postmaster as aforesaid under the said writing obligatory, and after the making and delivery thereof, to wit, on the first day of July, in the year 1850, and on divers other days before the commencement of this suit, to wit, at his office in said district, he, the said Oliver, as such deputy postmaster, and according to law, received divers other large sums of money for postage and other moneys properly payable and paid to him as such deputy postmaster for and

account of the said plaintiffs—that is to say, sums amounting together to fifty-one thousand and seventy-five dollars and twenty-five cents, and that he, the said Oliver, so negligently, careless and faithlessly acted then and there in his said office, and so neglected to take care of said money, and to superintend with due diligence the assistants and clerks employed by him to aid him as such deputy postmaster, that the said assistants and clerks, or some of them, by reason thereof, then and embezzled or took and converted to their own use, or otherwise wasted, a large amount of the said last mentioned sums of money, to wit, the sum of twenty thousand dollars thereof, whereby the same was wholly lost to the plaintiffs.

5. And the plaintiffs assign for a further breach of the aforesaid condition of said writing obligatory, that the said Oliver S. Beers, while acting as deputy postmaster as aforesaid under said writing obligatory, and after the same was made, did not promptly and faithfully pay out the public moneys which lawfully came to his hands as such deputy, upon the orders of transfer and payment thereof, which he received of the Postmaster General; but, on the contrary, failed so to do in this, to wit: that the said Oliver S. Beers, having received a large amount of the public moneys lawfully paid to him and placed in his hands as such deputy postmaster, to wit, the sum of twenty-five thousand dollars, which had not been lawfully transferred or paid out by him, heretofore, to wit, on the 29th day of January, in the year 1853, at his office, in Mobile, to wit, in the district aforesaid, failed and refused to pay to the lawful holder and payee thereof the amount of a draft or order upon him as such deputy postmaster, made by the Postmaster General, according to law, on the eighteenth day of January, in said year 1853, requiring him, the said Oliver, deputy as aforesaid, to pay to Thomas H. Watts, executor of Wade Allen, or order, eight thousand dollars, and which said draft or order was, to wit, on the 29th day of January, aforesaid, duly presented to him, the said Oliver, for payment, and payment thereof demanded, to wit, at his office in the district aforesaid, and payment thereof then and refused by him.

By reason of which several breaches the said writing obligatory has become forfeited, whereby *and* action hath accrued to the plaintiffs to demand and have of the said George N. Stewart, the defendant, the *the* aforesaid sum of twenty thousand dollars in the said writing obligatory mentioned.

Yet the said defendant hath not paid the said sum of money, or any part thereof, although often requested so to do, but hath wholly failed and refused, and still neglects and refuses, to the damage of the paintiffs of thirty thousand dollars, and therefore they bring suit, &c.

MANNING & WALKER,
Att'ys for Plaintiffs.

And on the 18th day of April aforesaid, upon the filing of the said amended declaration, an order was made and entered, in the words following:

Order of Continuance.

THE UNITED STATES
vs.
GEORGE N. STEWART

Upon the application of the defendant, this cause is continued until the next term.

Order allowing to 1st June to Plead or Demur.

And upon the further application of the defendant, he is allowed until the first of June next to plead or demur to the amended declaration herein filed.

And on the 29th day of April, 1854, the defendant filed in the clerk's office of said court a demurrer, in the words and figures following, to wit:

Plea—Oyer of Bond, &c.

THE UNITED STATES
vs.
GEORGE N. STEWART

Cause pending in the circuit court of the United States for the 5th judicial circuit and southern district of Alabama.

And the said defendant, George N. Stewart, by attorney, craves oyer of the writing obligatory, which is read to him in these words:

Know all men by these presents, that we, Oliver S. Beers, of Mobile, in the county of Mobile, State of Alabama, and Charles Le Baron and George N. Stewart, are held and firmly bound unto the United States of America, in the just and full sum of ($20,000) twenty thousand dollars; for the payment whereof well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

In witness whereof, we have hereunto subscribed our names and affixed our seals, this first day of July, in the year of our Lord one thousand eight hundred and fifty, (1850.)

And he further craves oyer of the condition thereto annexed, which is also read to him:

The condition of this obligation is such, that whereas the above bounden Oliver S. Beers is deputy postmaster at Mobile aforesaid: Now if the said Oliver S. Beers shall well and truly execute the duties of the said office, according to law and the instructions of the Postmaster General, and faithfully, once in three months, and

oftener if thereto required, render accounts of his receipts and expenditures as deputy postmaster to the Post Office Department, in the manner and formed prescribed by the Postmaster General in his several instructions to postmasters, and shall pay the balance of all moneys that shall come to his hands for the postage of whatever is by law chargeable, in the manner prescribed by the Postmaster General of the United States for the time being; and shall keep safely, without loaning, using, depositing in bank, or exchanging for other funds than as allowed by law, all the public money collected by him, or otherwise at any time placed in his possession and custody till the same is ordered by the Postmaster General to be transferred or paid out; and when such orders for transfer or payment are received, shall faithfully and promptly make the same as directed; and shall also faithfully do and perform as agent and depositary for the Post Office Department all such acts and things as may be required of him by the Postmaster General; and moreover shall faithfully account with the United States, in the manner directed by the said Postmaster General, for all moneys, bills, bonds, drafts, receipts, and other vouchers, which he, as agent and depositary as aforesaid, shall receive for the use and benefit of the said Post Office Department—then the above obligation shall be void.

OLIVER S. BEERS, [ ]
CH. LE BARON, [ ]
GEORGE N. STEWART. [SEAL.]

Witness: FRANCIS DAVID,
ROBERT M. SANDS.

Demurrer.

And thereupon he says actio non, because, he says, the matters and things set forth in the declaration and in the assignment of the breaches of the condition of said bond are insufficient in law to enable the plaintiffs to maintain their suit against him, and for causes of demurrer he assigns—

1st. That the bond and condition are insufficient in law to give the plaintiffs a right of action.

2d. That the assignment of breaches of the condition of said bond as set forth in said declaration are insufficient to enable the plaintiffs to maintain said suit, and therefore he demurs to each assignment of the breach of the condition of said bond separately.

HAMILTON,
For Def't.

And on the 5th day of January, 1855, the same being a day of the December term of said court, begun and held on the fourth Monday of December, A. D. 1854, the following order was entered in this cause:

Order allowing Amendment.

THE UNITED STATES
vs.
GEORGE N. STEWART.

This day came the United States, by their counsel, and came, also, the defendant, and the demurrer of the defendant to the plaintiffs' declaration coming on to be heard before the same was decided, the said United States move the court for leave to amend their declaration as to time and venue in some of the breaches assigned, which leave is given by the court, and the declaration amended accordingly. And on the 11th day of January, 1855, being also a day of the term of said court last aforesaid, the defendant filed a demurrer to plaintiffs' said amended declaration, which is as follows, to wit:

Plea and Prayer for Oyer of Bond, &c.

THE UNITED STATES
vs.
GEORGE N. STEWART.

Circuit Court of the United States for the 5th judicial circuit and southern district of Alabama.

And now the said defendant comes and defends the wrong, &c., and prays oyer of the said bond and the condition thereof, which are read to him as follows, to wit:

Know all men by these presents that we, Oliver S. Beers, of Mobile, in the county of , State of Alabama, and Charles Le Baron, and George N. Stewart, are held and firmly bound unto the United States of America in the just and full sum of ($20,000) twenty thousand dollars, for the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

In witness whereof, we have hereunto subscribed our names and affixed our seals, this first day of July, in the year of our Lord one thousand eight hundred and fifty, (1850.)

The condition of this obligation is such, that whereas the above bounden Oliver S. Beers is deputy postmaster at Mobile aforesaid: Now if the said Oliver S. Beers shall well and truly execute the duties of the said office according to law and the instructions of the Postmaster General, and faithfully, once in three months, and oftener if thereto required, render accounts of his receipts and expenditures, as deputy postmaster, to the Post Office Department, in the manner and form prescribed by the Postmaster General in his several instructions to postmasters, and shall pay the balance of all moneys that shall come to his hands for the postage of whatever is by law chargeable with postage in the manner prescribed by the Postmaster General of the United

States for the time being; and shall safely keep, without loaning, using, depositing in banks, or exchanging for other funds than as allowed by law, all the public money collected by him, or otherwise at any time placed in his possession and custody, till the same is ordered by the Postmaster General to be transferred or paid out, and when such orders for transfer or payment are received, shall faithfully and promptly make the same as directed; and shall also faithfully do and perform, as agent and depositary for the Post Office Department, all such acts and things as may be required of him by the Postmaster General, and moreover shall faithfully account with the United States, in the manner directed by the said Postmaster General, for all moneys, bills, bonds, notes, drafts, receipts, and other vouchers, which he as agent and depositary as aforesaid shall receive for the use and benefit of the said Post Office Department; then the above obligation shall be void.

OLIVER S. BEERS, [ ]
CH. LE BARON, [ ]
GEO. N. STEWART. [ ]

Witness: FRANCIS DAVID,
ROBERT M. SANDS.

Demurrer.

And therefore the said defendant says, that the matters and things as set forth and stated in said declaration are insufficient in law to enable the plaintiffs to maintain said suit, or to have and demand the sum of money mentioned in said writing obligatory, and therefore he demurs to said declaration, and for causes of demurrer he says, that said writing obligatory is uncertain and insufficient in law to enable the plaintiffs to maintain said suit, and that the same is void in law.

2. That the assignment of the breaches of the condition of said writing obligatory is too uncertain and insufficient to enable the plaintiffs to have or maintain said suit in this: that it does not appear from said assignment of breaches that the defaults complained of occurred or took place during the term for which this defendant was bound as the security of the said Oliver S. Beers, as deputy postmaster at Mobile, nor within two years prior to the commencement of this suit.

3. It does not appear from the declaration that the defaults specified were made or took place during the term of office for which said defendant was bound as the security of said Beers, and for these insufficiencies the defendant demurs to said declaration, and to the assignment of the breaches of the condition of said writing obligatory, separately, to all and each thereof, and prays judgment whether said plaintiffs ought to have or maintain said suit.

HAMILTON,
For Def't.

And on the 13th day of January, 1855, a day also of the term last aforesaid of said court, and after the overruling of the demurrer in this case, the defendant filed pleas in the words and figures following, to wit:

Circuit Court of the United States.—December Term, 1854.

UNITED STATES
vs.
GEORGE N. STEWART.

And the said George N. Stewart, defendant, comes by his attorneys and defends, &c., and for plea in this behalf saith, actio non, &c., because he saith that the said Oliver S. Beers did not in any manner break the condition of said bond as in said declaration the said plaintiff hath alleged, and to the said breach in the said declaration first assigned he saith:

1. That the said Beers did not while he was postmaster under said writing obligatory, and after the making and delivery thereof at the times in said breach mentioned, as such deputy postmaster, according to law, receive any moneys for postage, or *or* other moneys properly payable and paid to him as such deputy postmaster for account of said plaintiffs, to any amount whatever; nor is there now due and owing from him on account of said moneys to said plaintiffs any moneys which he, said Beers, has refused to pay, nor was there such demand or refusal to pay under instructions as the said plaintiffs aver; but that in truth and in fact all the said averments of fact in said first breach assigned and set forth are wholly untrue, and this he prays may be inquired of by the country, &c.

2. And for answer to the second breach in the said plaintiff's declaration, secondly assigned and set forth, the said defendant in fact saith, that the said Beers while he was deputy postmaster under said writing, and after the making and delivery thereof, did not fail or omit safely to keep, without using or loaning, any public money collected by him, or that otherwise and according to law came to his possession or custody; nor did he take or convert to his own use on the days in said breach alleged any sum of money before collected by him as deputy postmaster or otherwise according to law, or placed in his control as deputy postmaster in his office, whereby any such sum of money was lost to the said plaintiffs as in said second breach is alleged; but that the said averments in said second breach alleged are wholly untrue, and this he prays may be inquired of by the country, &c.

3. And as to the said third breach in the said declaration alleged, said defendant saith that said Beers did not receive for the use of the said Post Office Department, according to law, while he was postmaster, and as such, was agent and depositary for the Post Office Department, as in said condition mentioned, after the mak-

ing and delivery of said writing, and under the same, at the days or times specified, any such sums of money as is in said third breach mentioned, which he has failed to account for with the plaintiffs in the manner directed by the Postmaster General, as in said third breach is alleged, but that, in truth and fact, the said allegations in the said third breach averred are wholly untrue in manner and form as therein set forth, and this he prays may be inquired of by the country, &c.

4. And as to the fourth assignment of breaches in the said plaintiffs' declaration set forth, the said defendant saith that the said Beers did not, while he was deputy postmaster under said writing, and after the making and delivery thereof at the times and place in said fourth breach described, receive any such sums of money for postage or other moneys payable and paid to him as such deputy postmaster for and account of said plaintiffs, nor did he so negligently or carelessly or faithlessly act in his said office, or neglect to take care of said moneys, or superintend with due diligence the assistants or *or* clerks employed by him to aid him as such deputy postmaster, so that the said assistants or clerks embezzled, or took, or converted to their own use or waste any moneys, nor were any such moneys thereby lost to the said plaintiffs, as in the said *third* breach is averred and alleged, but in truth all said allegations in said fourth breach so alleged are wholly untrue; and this he prays may be inquired of by the country, &c.

5. And as to the said fifth breach in the said declaration specified, the defendant saith that said Beers did not fail or refuse, promptly and faithfully, to pay out any public moneys lawfully come into as such deputy upon any order of transfer and payment received of the Postmaster General; nor did he, having received any sum of public money lawfully paid to him or placed in his hands as deputy postmaster, which had not been lawfully transferred or paid out by him, nor did he, on the 29th January, 1853, fail or refuse to pay to any lawful holder and payee the amount of any draft or order drawn on him as such deputy postmaster, made by the Postmaster General according to law, at the time specified in said fifth breach, requiring him to pay said Watts, ex'r, or order, eight thousand dollars, nor was any such draft or order presented to him for payment, nor was any such draft refused payment, as the said plaintiff hath in his said fifth breach averred and alleged, but, in truth and in fact, the said allegations and averments in said fifth breach set forth are wholly untrue; and this he, said defendant, prays may be inquired of by the country, &c.

Wherefore the said defendant saith that no breach of the condition of said bond hath been committed, as he had above pleaded, and all which he has prayed may be inquired of by the country as aforesaid.

Plea 2.

And for a further plea in this behalf the said defendant saith actio non, &c., because, he saith, that no breach of the condition of said bond hath occurred or been committed, as set forth in the said declaration specified, within two years next before the commencement of this suit; wherefore he saith that said defendant is not in any manner responsible for any such breach; and this he is ready to verify, &c.; wherefore he prays judgment in this behalf, &c.

Plea 3.

And the said George N. Stewart, defendant, by his attorneys, comes and defends, &c.; and for a third plea in this behalf saith, that true it is that he, the said Oliver S. Beers, was, at the time of the date of said bond in the said declaration described, to wit, on the first day of July, in the year 1850, deputy postmaster at Mobile, and was in the exercise and discharge of the duties of said office.

And further he saith, that on the day and year aforesaid, he was in the discharge of the duties of said office, by virtue of an appointment made by the President of the United States during the recess of Congress and of the Senate of the United States, to wit, on the fourth day of April, 1849; which appointment so made was, by virtue thereof and by law, to endure until the end of the next succeeding session of the Senate of the United States, and no longer.

And further he saith, that the next succeeding session of the Senate of the United States after the making of said appointment ended and determined on the thirtieth day of September, eighteen hundred and fifty.

And the said defendant further saith, that the said Oliver S. Beers, deputy postmaster as aforesaid, did not in any manner, on the said first day of July, 1850, nor on the said thirtieth day of September, 1850, nor on any day or time between said days, omit to perform any of the duties required by the conditions of said bond, nor commit any of the breaches in the said declaration set forth; but that, on the contrary thereof, he did in all things, on the days aforesaid, and at all times between said two days, well and truly perform the conditions of said bond in all things, and did well and truly account for and pay over all moneys which came to his hands, as such deputy postmaster, for account of the plaintiffs, to said plaintiffs, as required by his duty, and did, during all said time, safely keep all such moneys, without using or loaning the same, as by his duty he was required to do; and did faithfully and diligently, during all said time, take care of the moneys of said office, and diligently superintend all the assistants and clerks of said office, and promptly pay all the moneys of said office, so

that no loss whatever was sustained by the said plaintiffs in this behalf; but did in all things do and perform the duties of said office during the time above specified. Wherefore he saith that the condition of said bond was not in any manner broken; and this he, the said defendant, is ready to verify, &c. Wherefore he prays judgment, &c.

HAMILTON,
For Defendant.

And on the 13th day of January, A. D. 1855, a day also of the term last aforesaid of said court, the plaintiffs, by their attorneys, filed in the clerk's office of said court their demurrer to defendant's pleas, in the words and figures following, to wit:

Demurrer to Pleas.

THE UNITED STATES
vs.
GEORGE N. STEWART.

Plaintiffs demur to so much of the defendant's first plea as relates to the second breach assigned in the declaration specially; and for cause of demurrer show, that in the issue thereby tendered by defendant upon said breach, the day or days upon which or time when the said Oliver S. Beers, as deputy postmaster as aforesaid, and while he was such, received the moneys of plaintiffs, as alleged in the declaration, is made a material part of the issue tendered, when, in truth and in law, such time is not material; wherefore plaintiffs pray judgment of said part of said first plea.

2. And to so much of said plea as relates to the third breach assigned plaintiffs in like manner demur, and for the same cause, that time is thereby made a material part of the issue tendered, when in truth and law such time is immaterial; wherefore plaintiffs pray judgment of said last mentioned part of said first plea.

3. And to so much of the same plea as relates to the fourth breach assigned by the plaintiffs, the said plaintiffs in like manner demur, and for cause of demurrer show, that time is thereby, and also place, made material parts of the issue thereby tendered, when, in truth and in law, they are immaterial; wherefore plaintiffs pray judgment of said last mentioned part of said first plea, and whether they shall be required further to answer said first plea.

4. And to the plea of defendant secondly above pleaded, plaintiffs demur, because, as they say, said plea is no answer to the declaration.

And to the plea thirdly by defendant pleaded, plaintiffs demur, and for cause of demurrer show, that it is not alleged in said plea that the bond sued on in this cause was given for the faithful performance by said Oliver S. Beers of his duties as deputy postmaster, under and during the continuance of his executive or presidential

appointment in said plea referrrd to, or that said appointment, or the said Oliver's term of office thereunder, continued after the day of the date of said bond; wherefore plaintiffs pray judgment of said plea, &c.

MANNING & WALKER,
Att'ys for Pl'ff.

The defendant joins in demurrer and prays the judgment of the court thereon.

HAMILTON, *for Def't.*

And on the 13th day of January, A. D. 1855, a day also of the term last *last* aforesaid of said court, the plaintiffs by their attorneys filed replications to defendant's pleas, in the words and figures following, to wit:

THE UNITED STATES
vs.
GEORGE N. STEWART.

And to the plea of the defendant secondly above pleaded, the said plaintiffs reply and say, that the defaults of the said Oliver S. Beers, as deputy postmaster as aforesaid, whereof the plaintiffs complain in their assignment of breaches of the said bond, did occur or were committed within two years next before the commencement of this suit; and of this they put themselves upon the country.

And the defendant does the like.

DARGAN, SMITH & HAMILTON,
Defendant's Attorneys.

And for a replication to the plea of the defendant thirdly above pleaded, the said plaintiffs say, that on and after the delivery by the defendant of the bond aforesaid, to wit, on the first day of July, in the year 1850, the said Oliver S. Beers was not deputy postmaster of the United States as aforesaid, under and by virtue of an executive appointment of him to such office as alleged, and for the term alleged in said third plea, but was, to wit, then deputy postmaster of the United States at Mobile aforesaid, to wit, in the district aforesaid, under and by virtue of an appointment of him, the said Oliver, as such deputy postmaster, theretofore made, to wit, on the 22d day of April, in the year 1850, by the President of the United States, by and with the consent of the Senate of the United States, for a long term of office, to wit, a term of four years from the day and year last aforesaid, unless he should be therefrom sooner removed by the President of the United States; that the bond aforesaid was made and delivered by the defendant, to wit, on the day of the date thereof, at, to wit, in the district aforesaid, for the faithful discharge by said Oliver of the duties of said office, under said last mentioned appointment; and that the breaches of

the condition of said bond whereof plaintiffs have complained in their declaration in this cause, occurred and were committed after the making and delivery as afosesaid of said bond, and before the commencement of this suit, to wit, in the district aforesaid; and this they are ready to verify.

MANNING & WALKER, *for Pl'ffs.*

Rejoinder.

And on the said 13th day of January, A. D. 1855, being a day of the aforesaid term of said court, the defendant filed in the clerk's office of said court a rejoinder to the plaintiffs' replication to defendant's third plea, in the words and figures following, to wit:

UNITED STATES
vs.
GEORGE N. STEWART.

And the said defendant, for rejoinder to the plaintiffs' replication to defendant's third plea, says, that at the time of the execution of said bond, said Oliver S. Beers was not postmaster in the manner and for the term of office set forth in the replication, but was postmaster by presidential appointment, as set forth in said third plea; and so he says, said bond applied to and covered only the time set forth in the third plea, and did not apply to and cover any other or new tenure of office; and of this he puts himself upon the country.

DARGAN & HAMILTON & SMITH,
For Def't.

And the plaintiffs do the like.

MANNING & WALKER,
For Plaintiffs.

Judgment.

And on the aforesaid 13th day of January, A. D. 1855, being a day of the said December term, 1854, the following proceedings were had:

THE UNITED STATES
vs.
GEORGE N. STEWART.

This day came the United States, by their attorneys, and came also the said defendant, by his attorneys; whereupon the said defendant demurs to the said amended declaration as in his demurrer set forth, and the matters of law being argued and understood by the court, it is considered by the court the said demurrer be overruled, and that said defendant do plead to the plaintiff's declaration; whereupon the said defendant files his three pleas to the said amended declaration, to each of which pleas the said plaintiffs,

by their attorneys, demur, as in their demurrer on file set forth; and the matters of law therein being argued and understood by the court, it is considered that the demurrer to the first of the three pleas pleaded by the defendant be sustained, but the demurrer to the second and third pleas by him pleaded be overruled; and the defendant has leave to amend his said first plea so as to avoid the defect mentioned in the demurrer thereto, which he declines to do; and the said plaintiffs reply to the said second and third pleas, and issue is thereon taken as to the second plea; and said defendant rejoins to plaintiffs' replication to the third plea by him pleaded, and issue thereon. Pending the argument in this cause, the court adjourned until Monday morning, the 15th January, 1855, at 10 o'clock a. m. of said day.

Monday morning, January 15th, 1855.

The court met pursuant to adjournment: present Hon. John Gayle, presiding.

This day the argument in this cause was continued, and before it was concluded the court adjourned until to-morrow morning, at 10 o'clock.

Tuesday morning, January 16th, 1855.

This day the court met pursuant to adjournment: present the Hon. John Gayle, presiding.

1st Jury, and Verdict.

And this day came the said parties, by their attorneys, and also came a jury of good and lawful men, to wit; Peleg Brown and eleven others, who being elected, tried, and sworn, and charged the truth to speak in the issues joined, on their oaths do say, We, the jury, find the issues for the defendant; it is therefore considered by the court that the defendant go hence without day.

Whereupon the plaintiffs prayed a writ of error from the said judgment to the Supreme Court of the United States, and the said cause was taken to the said Supreme Court on a bill of exceptions filed by the said plaintiffs, and allowed by the court.

And afterwards, to wit, at a term of said court begun and held in and for said district at Mobile, on the second Monday of April, A. D. 1857, came the said plaintiffs, by their attorney, and produced the opinion and mandate of the Supreme Court of the United States, reversing the judgment in the said cause; which are filed, and the said cause redocketed for further proceedings.

And afterwards, to wit, on the 21st day of April, A. D. 1857, being a day of the said last-mentioned term of said court, the following proceedings were had in said cause, to wit;

Judgment for Pl'ff.

THE UNITED STATES vs. GEORGE N. STEWART. } 3,259.

This day came as well the United States of America by their attorney, A. J. Requier, esq., as the said defendant by his attorneys, and a jury being called to try the issue joined between the parties aforesaid, came, to wit, Edward S. Trigg, John Y. Thompson, W. B. Harwood. R. L. Ewill, C. Wainright, G. G. Prentice, James Bruce, R. L. Lawrence, J. B. Hupin, George Mason, J. M. Muldon, jr., and Thomas Ellison, twelve good and lawful men, who being duly elected, tried, and sworn, on their oaths do say, We, the jury, find for the plaintiffs, and assess the damages at eight thousand six hundred and eighty-six $\frac{50}{100}$ dollars. It is therefore considered by the court that the said United States of America, the plaintiffs, do recover of the said George N. Stewart (defendant) the sum of twenty thousand dollars for their debt in the declaration mentioned, to be discharged by the payment of the said sum of eight thousand six hundred and eighty-six dollars and fifty cents for their damages, so by the jurors aforesaid in form aforesaid assessed, and costs of suit in this behalf expended.

Whereupon the following motion was placed upon the motion docket of said court, at the said term, by the defendant in said cause, to wit:

Motion to allow time to file Petition, &c., for new trial.

THE UNITED STATES vs. GEORGE N. STEWART. } April Term, 1857.—Trial Docket No. 10.

The defendant moves the court that the proceedings in this cause be stayed for forty-two days, as prescribed by statute, in order to allow time for filing a petition with reasons and a showing for a new trial of the issues joined in this cause, the verdict rendered being erroneous.

DARGAN, *for Def't.*
REQUIR, *contra.*

Order to stay Execution and give time to file Petition, &c.

And on the 7th day of May, A. D. 1857, being another day of the said term last mentioned, the following order was made, to wit:

Order by Hon. John Gayle on application of the Defendant.

THE UNITED STATES vs. GEORGE N. STEWART. }

It is ordered by the court, that execution of the judgment in this

cause be stayed forty-two days, to give defendant time to file in the clerk's office a petition for a new trial.

(Petition, &c., filed in vacation.)

Petition for new trial, and Order to stay Exctn. to next term.

In the Circuit Court of the United States, at Mobile.—April Term, 1857.

THE UNITED STATES vs. GEORGE N. STEWART. } Debt on Bond.

To the Honorable John Gayle, judge, presiding in said court, the petition of George N. Stewart, defendant in said above entitled cause, respectfully shows: That at the April term of said court the above entitled cause came on to be tried before your honor on the issues of fact joined in the cause, and that by the decision of the jury by them returned on said trial, a verdict was found for the United States, and against your petitioner, for the sum of $——.

Your petitioner further shows, that the said verdict was wholly unauthorized by the evidence produced before the said jury and the law of the case, and that said jury grossly and palpably erred in finding said verdict, which by their oaths they were in no manner warranted to find and return, and that said verdict was directly in contravention of the law of the case, which was fully explained and given them in charge by the court; and that on said trial the defendant was palpably and clearly, and beyond any doubt, entitled to a verdict for the defendant; all which facts are within the knowledge of your honor, as having presided at said trial; wherefore no further proof thereof is now needed to make the same manifest.

In consideration of all which, your petitioner prays that this, his petition, be allowed to be filed as provided by statute, to the end that the execution of said judgment may be stayed till the next term of said court, when said verdict may be set aside and a venire de novo awarded to try the said issue, so that a correct verdict may be rendered thereon. And, as in duty bound, &c.

GEORGE N. STEWART,
Defendant.

The foregoing petition is allowed to be filed on the ground that the finding of the jury, in the opinion of the court, was contrary to the evidence and the charge of the court. It is therefore ordered that the execution be stayed till the next term.

JOHN GAYLE,
Presiding Judge Cir. Court.

Filing.

Filed 16th June, 1857.

GEO. E. HOLT, *Clerk.*

And afterwards, to wit, at a term of said court begun and held in and for said district, on the fourth Monday of December, A. D. 1857, the following proceedings were had, to wit:

This day came as well the said United States of America, by A. J. Requier, esq., their attorney, as the said defendant by his attorneys, and the said defendant moved the court as follows, to wit:

Motion to set aside Verdict, &c.

THE UNITED STATES vs. GEORGE N. STEWART. } Verdict for Plaintiffs at April term, 1857.

The proceedings in this cause having been stayed on motion of the defendant, a motion is now made to set aside the verdict, and for a new trial.

DARGAN, *for motion.*
REQUIER, *contra.*

Order to set aside Verdict.

THE UNITED STATES OF AMERICA vs. GEORGE N. STEWART.

This day came as well the United States of America, by A. J. Requier, esq., their attorney, as the said defendant by his attorneys, and the defendant's motion herein to set aside the verdict and judgment therein rendered at the last term being heard, it is now ordered by the court that the said verdict and judgment therein be set aside, and a venire de novo awarded.

And afterwards, to wit, on the 7th day of January, A. D. 1858, being another day of the said last mentioned term, the following proceedings were had, to wit:

THE UNITED STATES OF AMERICA vs. GEORGE N. STEWART. } 3,259.

This day came as well the United States of America by A. J. Requier, esq., their attorney, as the said defendant by his attorneys, and a jury being called to try the issue joined between the parties, came, to wit, A. W. Elgin, P. Duvall, Alanson Knapp, George W. Boyd, B. F. Roland, Daniel Robertson, John Hammond, S. S. Jennings, James Devine, E. Murray, T. H. Jenks and William Hall, twelve good and lawful men, who being duly elected, tried and sworn:

Whereupon, by consent, it is ordered that the jurors aforesaid be adjourned, and the cause continued until to-morrow.

And on the 8th day of January, A. D. 1858, being another day of the said term last mentioned, the following proceedings were had herein, to wit:

Judgment.

THE UNITED STATES OF AMERICA
vs.
GEORGE N. STEWART. } 3,259.

This day came the parties by their attorneys, and the jury empanelled and sworn herein on yesterday this day appeared in open court, and having heard the evidence, upon their oaths do say: We, the jury, find for the defendant. It is therefore considered by the court that the plaintiffs take nothing by their writ, and that the said defendant go thereof hence without day, &c.

And afterwards, to wit, on the 14th day of January, A. D. 1858, being another day of said term last mentioned, the following further proceedings were had herein, to wit:

THE UNITED STATES
vs.
GEORGE N. STEWART.

A bill of exceptions, taken by the plaintiffs, to the opinion of the court on the trial of this cause at the present term, was signed and sealed by the court, and ordered to be filed and made a part of the record in said cause.

Bill of Exceptions.

In the Circuit Court of the United States for the 5th judicial circuit and southern dist. of Ala.—December Term, 1857.

THE UNITED STATES OF AMERICA, Pl'ffs,
vs.
GEORGE N. STEWART, Defendant.

Be it remembered, that on the trial of this cause, the attorney for the plaintiff gave in evidence the original bond sued on, (all of which except the names, places, date and amount, was printed,) a true copy whereof is annexed as a part of this bill of exceptions, and marked A.

Bond A.

Know all men by these presents, that we, Oliver S. Beers, of Mobile, in the county of Mobile, State of Alabama, and Charles Le Baron and George N. Stewart, are held and firmly bound unto *unto* the United States of America, in the just and full sum of ($20,000) twenty thousand dollars, for the payment whereof well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

In witness whereof, we have hereunto subscribed our names and affixed our seals, this first day of July, in the year of our Lord one thousand eight hundred and fifty, (1850.)

The condition of this obligation is such, that whereas the above

bounden Oliver S. Beers is deputy postmaster at Mobile, aforesaid: Now if the said Oliver S. Beers shall well and truly execute the duties of the said office according to law and the instructions of the Postmaster General, and faithfully once in three months, and oftener if thereto required, render accounts of his receipts and expenditures as deputy postmaster to the Post Office Department, in the manner and form prescribed by the Postmaster General in his several instructions to postmasters, and shall pay the balance of all moneys that shall come to his hands for the postage of whatever is by law chargeable with postage, in the manner prescribed by the Postmaster General of the United States for the time being, and shall keep safely without loaning, using, depositing in banks, or exchanging for other funds than as allowed by law, all the public money collected by him, or otherwise, at any time placed in his possession and custody, till the same is ordered by the Postmaster General to be transferred or paid out; and when such orders for transfer or payment are received, shall faithfully and promptly make the same as directed, and shall also faithfully do and perform, as agent and depositary for the Post Office Department, all such acts and things as may be required of by the Postmaster General, and, moreover, shall faithfully account with the United States, in the manner directed by the said Postmaster General, for all moneys, bills, bonds, notes, drafts, receipts, and other vouchers which he, as agent and depositary as aforesaid, shall receive for the use and benefit of the said Post Office Department, then the above obligation shall be void.

OLIVER S. BEERS, [SEAL.]
CH. LE BARON, [SEAL.]
GEORGE N. STEWART. [SEAL.]

Witness—
FRANCIS DAVID,
ROBERT M. SANDS.

STATE OF ALABAMA, *ss.*

I hereby certify, that the securities above named, and who have signed the foregoing bond, viz: Chas. Le Baron and George N. Stewart, are severally responsible and sufficient to insure the payment of the entire penalty named therein. Witness my hand this first day of July, A. D. 1850.

JOHN GAYLE,
Judge District Courts U. States for Alabama.

Memorandum in pencil on back of Bond.

Bond and Oath received, and Commission sent, July 15th, 1850.

Which being read, the defendant insisted on having read also to the jury, as evidence, an endorsement made with a lead pencil on the said bond, without signature, and without proof by whom the

endorsement was made, in the words and figures following, to wit: "Bond and oath received, and commission sent, July 15th, 1850;" to the reading of which as evidence, plaintiffs by their counsel objected; and the objection was overruled by the court, and the pencil endorsement read by the defendant as evidence to the jury, to which ruling of the court plaintiffs then and there excepted.

Plaintiffs then introduced the commission dated the 22d day of April, in the year eighteen hundred and fifty, and signed by the late President of the United States, Zachary Taylor, to said Oliver S. Beers as deputy postmaster of the United States at Mobile, Alabama, under appointment by and with the advice and consent of the Senate of for the term of four years, unless the President of the United States for the time being should be pleased sooner to revoke and determine his commission, *proved* that on and after the first day of July, 1850, and until the 6th day of February, in the year 1853, said Beers was in office, and acting as deputy postmaster at Mobile, and that he became a defaulter as alleged in the assignment of breaches of the condition of the bond, and to a large amount, during the latter part of the time when he was holding the office under the appointment by and with the advice and consent of the Senate, and within two years before this suit was brought. The amount of said default was established by a duly certified Treasury transcript of his accounts, certified by the Auditor of the Treasury for the Post Office Department, on the third day of December, A. D. 1853, a true copy whereof is hereto annexed as a part of this bill of exceptions, and marked B.

DR. *Oliver S. Beers, late P. M., Mobile, Alabama, in acc't with the U. S.* CR.

[Rec. ccix, D. T., 1858.]—4

A

(1)

	To balance due on his quarterly returns as P. M., from July 1 to Sep. 30, 1850	$4,371 83		1850, July 1	By d'ft in favor of J. J. Thomason		$230 16
1850, Oct. 29	Am't rec'd of Geo. W. Robbins	1 22		" 9	Do	R. B. Alexander	501 18
	Oct. 1 to Dec. 31, 1850	5,241 85		Aug. 7	Do	Rich'd Prince	63 31
	1851, Feb. 27—D'ft on J. A. Hammack.	13 92		"	Do	R. B. Alexander	250 00
	Jan. 1 to March 31, 1851	6,748 22		Oct. 17	Do	Gallagher & Christie.	69 52
	1851, May 14—Balance transferred from late acc't	1,899 67		"	Do	Alvis Davis	240 99
	April 1 to June 30, 1851	5,518 57		"	Do	D. Maggard, ass	220 29
	1852, Nov. 5—This sum rec'd of J. Robinson, July 1, 1852	256 72		"	Do	P. Williams, "	176 00
	1852, Sept. 18—Am't deposited by W. Waker	387 40		"	Do	F. C. Ewers, "	302 89
	July 1 to Sept. 30, '51	3,429 09		"	Do	P. Williams	57 37
	1851, Dec. 19—Draft on E. P. Brown.	27 00		Nov. 12	Do	Joseph Easley	82 19
	Oct. 1 to Dec. 31, '51	3,916 70		" 18	Do	A. A. Bryant	155 36
	Jan. 1 to Mar. 31, 1852	4,330 04		"	Do	Allen & Powell	487 09
	Apl. 1 to June 30, 1852	4,480 21		"	Do	Sam'l Freyer	122 34
	July 1 to Sep. 30, 1852	2,675 85		"	Do	Malinda Dawson	14 59
	Oct. 1 to Dec. 31, 1852	5,276 95		"	Do	J. W. Portis	69 67
	Jan. 1 to Feb'y 5, 1853	2,500 01		"	Do	Duncan & Hart	39 06
				"	Do	J. B. Dixon	37 55
				" 24	Do	Jas. Thorndon	465 29
				"	Do	A. A. Connella	277 56
				"	Do	J. D. Riggs	54 00
				" 23	Do	J. R. Powell	495 25
				" 26	Do	Wilkins & Harrison	380 44
				" 30	Do	O. Eastand	95 58
				"	Do	S. M. Wheeler	85 46
				" 23	Do	J. D. Harper	203 00
				1851, Jan. 7	Do	W. Nicholson	29 98
				" 10	Do	D. E. W. Tally	397 47
				"	Do	L. M. Simpson	109 50
				" 29	Do	C. V. Fortune	337 40
				Feb. 13	Do	do	135 87
				" 18	Do	J. R. Powell, ass	75 00
				"	Do	Ventees Sykes	26 25
	Amount carried forward	51,075 25			Amount carried forward		

579

ACCOUNT OF O. S. BEERS—Continued.

Amount brought forward.....	51,075	25	Amount brought forward.....			.....	
			1851, Feb. 19	By d'ft in favor of	A. A. Connella.....	328	23
			"	Do	A. Woodward.....	88	64
			"	Do	Duncan & Hart	52	90
			"	Do	J. B. Dixon.....	37	61
			"	Do	S. M. Wheeler.....	95	56
			"	Do	John Owens	144	22
			"	Do	R. S. Brasher.....	81	25
			" 26	Do	J. A. Fortune.....	681	14
			"	Do	do	752	04
			"	Do	Jas. Lynch.....	43	75
			"	Do	A. W. Sorsby.....	25	45
			"	Do	Robt. Ford.....	43	75
			"	Do	J. D. Harper.....	180	69
			Mar. 1	Do	Gonzales & Quiggles.	231	75
			"	Do	N. L. & D. Anderson	115	34
			" 3	Do	M. S. Alexander.....	90	41
			" 4	Do	N. L. Anderson	20	58
			"	Do	Carter & Acre.....	30	89
			"	Do	Knox & Round.....	52	69
			"	Do	Malinda Dawson.....	13	42
			"	Do	Jas. Thornton.....	463	47
			"	Do	Jno. W. Portis.....	136	49
			" 5	Do	J. L. Owen.....	31	75
			"	Do	F. Harnell	44	63
			"	Do	C. V. Fortune.....	352	89
			"	Do	H. M. Round.....	69	60
			" 11	Do	Wm. Nicholson.....	33	30
			"	Do	Jas. Houston.....	182	53
			" 21	Do	Wm. H. White.....	20	89
			April 1	Do	C. C. Landon	77	00
			May 6	Do	F. Harwell.....	53	85
			" 9	Do	J. B. Dixon.....	50	91
			"	Do	Jas. Houston.....	74	02
			" 14	Do	R. Willoughby.....	30	00

				"	15	Do J.W. Portis..... 126 40
				"	16	Do Gonzales & Quiggles. 225 75
				"		Do N. L. Anderson..... 25 96
				"		Do Carter & Acree..... 49 99
				"	19	Do J. A. Fortune..... 454 73
				"	20	Do Wm. Nicholson..... 37 70
				"	9	Do Malinda Dawson..... 10 00
				"		Do S. M. Wheeler..... 95 22
				"	30	Do Deposit..... 18 52
				July	22	Do James Lynch..... 140 29
				Aug.	9	Do M. S. Alexander..... 105 68
				"		Do Jno. McInnis 162 54
				"		Do H. M. Round..... 105 42
				"		Do Thos. J. Clay 337 22
				"		Do F. Harwell..... 53 08
				"		Do Joseph Houston 101 69
				"		Do J. A. Fortune..... 705 65
				"		Do Jas. Thornton..... 497 97
				"		Do Malinda Dawson..... 7 94
				"		Do Jno. B. Dixon..... 38 60
				"		Do R. Jamison, jr..... 512 00
				Aug.	18	Do N. L. & D. Anderson. 68 33
				"	19	Do Carter & Acree..... 34 70
				"		Do Wm. Nicholson..... 32 01
				"		Do G. C. Powell..... 69 26
				"		Do J. H. Callaway..... 26 80
				"	21	Do J. R. Powell..... 749 56
				"	26	Do Jno. B. Portis..... 119 69
				Sep.	3	Do James Lynch..... 43 75
				Dec.	8	By short payment on draft on J. A. Hammond..... 12 03
				"	31	By am't stamps redeemed..... 51 60
				Nov.	3	By d'ft in favor Malind. Dawson..... 10 45
				"		Do Jas. Thornton..... 500 51
				"	5	Do H. M. Round..... 153 69
				"		Do F. Harwell..... 64 88
				"	6	Do R. H. W. Bigger..... 71 88
Amount carried forward.....		51,075 25		Amount carried forward.....		

ACCOUNT OF O. S. BEERS—Continued.

Amount brought forward.....		51,075	25	Amount brought forward.....			
		1851, Nov.	6	By d'ft in favor of	G. W. Haggard	91	85
		"		Do	M. Patterson.....	21	15
		"		Do	J. H. Calloway	41	12
		"		Do	G. C. Powell.....	63	23
		"		Do	S. M. Wheeler.....	93	25
		"		Do	A. Pickens.....	3	82
		"	13	Do	Jno. R. Dixon.....	53	99
		"		Do	J. W. Portis.....	113	16
		"	14	Do	Jas. Lynch.....	43	05
		"		Do	Reddick.....	83	40
		"		Do	A. W. Sorsby.....	43	79
		"		Do	M. S. Alexander.....	177	14
		"		Do	W. H. White.....	12	34
		"		Do	Knox & Round.....	445	37
		"		Do	Carter & Acree.....	43	04
		"		Do	Wm. Nicholson.....	34	60
		"	17	Do	C. V. Fortune.....	497	71
		Dec.	1	Do	Gonzales & Quiggles.	231	75
		"	24	Do	N. L. Anderson.....	8	50
		1852, Jan.	6	Do	G. D. Fisher.....	56	59
		Feb.	17	Do	Malinda Dawson.....	16	94
		"		Do	Andrew Perkins.....	7	82
		"		Do	John B. Dixon.....	60	76
		"		Do	William Nicholson...	38	82
		"		Do	Carter & Acree.....	43	05
		"		Do	S. M. Wheeler.....	96	59
		"		Do	G. C. Powell.....	68	03
		"		Do	F. Harwell.....	63	64
		"		Do	Syd. Moore, att'y....	133	63
		"		Do	J. W. Portis.....	145	78
		"	19	Do	R. H. W. Bigger.....	83	29
		"		Do	R. H. Brasher.....	53	78
		"		Do	M. Patterson.....	20	35
		"		Do	D. Medder	20	07

		"		Do	A. W. Sorsby	54 47
		"		Do	V. Sykes	21 25
		"	25	Do	E. L. Selph	12 13
		"		Do	Sam'l Bishop	53 08
		"	29	Do	G. D. M. Connell	225 00
		"		Do	Duncan & Hart	73 61
		Mar.	15	Do	Jas. Lynch	43 75
		"		Do	N. L. Anderson	13 48
		Ap'l	16	Do	J. Wilkinson	21 51
		"	29	Do	J. B. Dixon	47 80
		"		Do	M. Patterson	20 82
		"		Do	F. Harwell	54 39
		"	30	Do	Carter & Acree	65 55
		"		Do	S. M. Wheeler	88 68
		"		Do	G. C. Powell	67 72
		"		Do	Wm. Nicholson	30 76
		"		Do	A. W. Sorsby	49 34
		"		Do	Malinda Dawson	17 73
		"		Do	A. Pickens	7 59
		May	1	Do	R. H. Brasher	54 25
		"		Do	N. L. Anderson	32 18
		"		Do	Duncan & Hart	70 01
		"	10	Do	Joel Barnum	33 26
		"		Do	Wm. Johnson	58 00
		"	15	Do	J. H. Calloway	113 22
		June	3	Do	Josh. Jones, jr	37 26
		"	24	Do	T. Sandford & Co	21 00
		July	2	Do	Joel Brunan	46 00
		"	3	Do	A. B. McCarty	115 99
		"	24	Do	R. H. Brasher	51 10
		"		Do	Andrew Pickens	6 40
		"		Do	Malinda Dawson	16 85
		"		Do	Wm. Nicholson	51 45
		"		Do	Dan'l Medder	110 00
		"		Do	Wm. H. Roberts	197 06
		"		Do	W. H. White	31 35
		"		Do	M. Patterson	18 88
Amount carried forward	51,075 25			Amount carried forward	

Q817

ACCOUNT OF O. S. BEERS—Continued.

Amount brought forward.....	51,075 25		Amount brought forward.....		.....
		1852, July 24	By df't in favor of	Jno B. Dixon.....	61 30
		"	Do	E. P. Jones.....	43 53
		" 26	Do	John Owens.....	47 04
		"	Do	Sam'l Fryer.....	114 65
		"	Do	F. Harwell.....	60 13
		"	Do	J. H. Powell.....	16 95
		" 29	Do	J. W. Portis.....	126 54
		"	Do	J. L. Owen.....	30 55
		"	Do	W. W. Carlisle.....	87 39
		"	Do	G. C. Powell.....	67 56
		"	Do	Carter & Acree.....	103 75
		"	Do	Wm. M. Perryman..	68 93
		Aug. 3	Do	Duncan & Hart.....	65 33
		"	Do	R. H. W. Bigger.....	75 68
		" 7	Do	Sam'l Bishop.....	58 84
		" 21	Do	N. L. Anderson.....	21 19
		"	Do	J. Reddick.....	20 19
		" 28	Do	J. H. Calloway.....	27 81
		"	Do	Jas. Lynch.....	37 77
		" 31	Do	Sam'l M. Wheeler...	91 46
		Sept. 8	Do	John J. Humphreys.	23 00
		" 17	Do	A. B. M. Carty.....	95 61
		Nov. 12	Do	W. H. White.....	17 17
		"	Do	F. Harwell.....	13 24
		"	Do	R. H. W. Bigger.....	77 62
		"	Do	G. C. Powell.....	66 54
		"	Do	S. M. Wheeler.....	94 28
		"	Do	Duncan & Hart.....	69 87
		"	Do	M. Dawson.....	20 54
		"	Do	Wm. Nicholson.....	38 36
		"	Do	A. W. Sorsby.....	48 52
		"	Do	D. Lookwrighll.....	112 78
		"	Do	Joel Barnum.....	78 72
		"	Do	R. H. Brasher.....	50 08

		" 16	Do	A. Y. England.....	8 21
		" 19	Do	J. W. Portis.....	125 75
		" 26	Do	Carter & Acree.....	85 87
		Dec. 15	Do	A. Y. England.....	100 00
			By this sum paid E. H. Metcalf, sp'l agent, per letter dated 8 Feb., '53.....		6,171 43
			By this sum paid E. H. Metcalf, sp'l agent, per letter dated 21 Feb., '53....		100 00
			Balance		20,543 52
	$51,075 25				$51,075 25
To balance.....	$20,543 52				
" interest from Feb. 5, 1853.					

Certificate of the Auditor of the Treasury for the Post Office Department.

OFFICE OF THE AUDITOR OF THE TREASURY FOR THE P. O. DEPARTMENT.

I hereby certify the within and attached to be a true and correct transcript of the account of Oliver S. Beers, late postmaster at Mobile, Alabama, as audited and adjusted at this office.

In testimony whereof, I have hereunto signed my name and caused to be affixed my seal of office, at Washington, this third day of December, A. D. 1853.

WM. F. PHILLIPS,
Auditor of the Treasury for the Post Office Department.

Among the moneys received by said Beers, in respect to which he was charged as a defaulter, was a balance transferred from his account as late postmaster to his debit as postmaster, by and with the consent of the Senate as aforesaid, in respect to which the plaintiffs by their counsel offered in evidence a writing, dated Mobile, April 9th, 1851, and signed by George N. Stewart and C. Le Baron, a true copy of which is hereto annexed to this bill of exceptions, and marked C.

Copy of writing signed by Stewart and Le Baron, and marked C.

Oliver S. Beers, postmaster at Mobile, having been appointed and subsequently confirmed by the Senate, and having, in compliance with the regulations and rules of the department, transferred a balance of thirty-six hundred and twenty-six and $\frac{84}{100}$ dollars from him due, as per account, before the time of the confirmation, to the debit of his new account since the confirmation, we, the sureties of the said Oliver S. Beers, do agree to the said transfer, and acknowledge ourselves bound as sureties for said Beers, to account for said balance so transferred as a proper debit, and admit the transfer is made with our consent, as sureties, under the new confirmation appointment.

Mobile, April 9, 1851.

GEORGE N. STEWART,
C. LE BARON.

Which writing was so offered not as evidence of any new liability contracted, but as an admission merely, dispensing with other proof of the legality of said transfer, and further as an estoppel upon the defendant; but this evidence, upon objection thereto from the defendant, was ruled out by the court, to which ruling the plaintiffs then and there excepted. It was admitted by the defendant that the defendant and the other surety of Beers had acknowledged to E. H. Metcalf, a special agent of the government for the examination in February, 1853, of the defaults of the said Beers, that the bond in suit was given with the view and intent of procuring for Oliver S. Beers the appointment, by and with the advice and consent of the Senate.

On the part of the defendant the said Oliver S. Beers was offered as a witness. His competency was duly objected to by the plaintiff, whereupon a release was executed to him by the defendant; and the court having thereupon ruled he was competent to testify, the plaintiff then and there excepted to said ruling. The defendant then proposed to prove by said Beers, that in April, of the year 1849, he was appointed deputy postmaster at Mobile, by a commission (which was not produced) from the late President Zachary Taylor, under an executive appointment; but to the admission of this testimony the plaintiff by his counsel excepted, and insisted

that the record evidence of such appointment, or a copy thereof, ought to be produced; but the witness having deposed that the commission he received had been destroyed at the burning of his house, the court permitted him to testify as aforesaid; to which ruling the plaintiffs then and there excepted.

Said Beers further testified, that the bond in suit was signed by the parties on the first day of July, 1850, at Mobile, but was not sent on until the next day, or the day after, when it, and also his oath of office under the last appointment, by and with the advice and consent of the Senate, were enclosed together and sent to the Postmaster General by mail. He further testified that he received the commission under the second appointment from about the twentieth to the last day of July, 1850; and he further stated that this bond was approved at Washington, on the 15th July, 1850. Upon cross-examination said Beers deposed, that the time then usually occupied by the United States mail in going from Mobile to Washington was five days.

Plaintiffs then proposed to establish by witness that the bond in suit was made for the express purpose, on the part of those who signed it, of securing to him the office of said deputy postmaster under the last appointment, by and with the advice and consent of the Senate. Whereupon the defendant, by his counsel, expressly stated that he would interpose no objection to the adduction of such proof, and the witness then deposed accordingly. Upon this evidence the court charged the jury, "that if the bond in suit was signed in Mobile on the first day of July, 1850, and Beers was then deputy postmaster under an executive appointment, and if they believed that it was not approved of by the Post Office Department until the 15th of July, 1850, then under the state of the pleadings and the issue joined in this cause the defendant was entitled to a verdict; that the plaintiff might commence a new suit and declare a right and recover, even after their verdict in favor of defendant, but as the case was stated in the record the plaintiff could not recover if the bond did not take legal effect until the 15th July, 1850."

To this charge the attorney for the United States excepted, and requested the court to charge the jury that as the defendant had admitted the due execution of the bond by their pleadings on the first day of July, 1850, *the* could not be permitted to question the fact so admitted, which the court refused to give; and thereupon the plaintiffs' counsel excepted.

The defendant's counsel then requested the court to charge as follows: "If the jury believe that the bond now produced before them was signed at Mobile on the first of July, 1850, and sent to Washington, and that it was approved there by the department on the 15 July, 1850, as stated in the evidence and endorsed on the bond, then the obligation is a different one from that alleged

and set forth in the declaration and replication of the plaintiffs to the third plea; and as the liability would be different from the one set forth in the issue joined in the third plea, then if they believe the bond was so approved on that day (the 15 July, 1850,) or on any other day after the day of its date, they must find the issue for the defendant, on that plea." Which charge the court gave as requested; to which the plaintiffs, by their counsel, then and there excepted.

Whereupon one of the jury asked the court whether they, the jury, "had any discretion in the matter?"

To this the court replied, that under the pleadings in the cause, if they believed the bond was not approved by the department until the 15 July, 1850, then they had no discretion, if they had any respect for the opinion of the court, but that it was for them to decide on the facts, and to take the law from the court, and if the fact be that the bond was not approved until the 15th, then they should find for the defendant.

The plaintiffs' counsel duly excepted to each and all of the instructions so given by the court, as well as to his refusal to charge as requested; and thereupon the court signed and sealed this bill of exceptions in open court during term time.

JOHN GAYLE, *Judge.* [SEAL.]

This bill of exceptions will apply to the case against Charles Le Baron, as well as that of G. N. Stewart.

JOHN GAYLE.

Filed 14th January, 1858.

GEO. E. HOLT, *Clk.*

Writ of Error.

UNITED STATES OF AMERICA.

The President of the United States to the Judges of the Circuit Court of the United States for the southern district of Alabama, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in said circuit court of the United States for the southern district of Alabama before you, between the United States of America, plaintiffs, and George N. Stewart, defendant, manifest error hath happened, to the great damage of the said plaintiffs, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the

first Monday of December next, in the Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to law and custom of the United States should be done.

Witness the Hon. Roger B. Taney, Chief Justice of the Supreme Court of the United States, the fifth day of February, A. D. 1858.

GEO. E. HOLT,
Clk C. C. Sou. Dist. Ala.

Citation in Error.

UNITED STATES OF AMERICA,
Southern District of Alabama.

To George N. Stewart, Esq., or Messrs. Dargan & Hall and Hamilton, his attorneys, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden in the city of Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Alabama, wherein the United States are plaintiffs, and the said George N. Stewart is defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the plaintiffs in that behalf.

Witness the Hon. John Gayle, one of the judges of the circuit court aforesaid, the 5th day of February, 1858.

JOHN GAYLE, *Judge.*

Marshal's Return.

Rec'd 11th Feb'y, 1858, and executed the same day.

C. M. GOUBOLD, *U. S. M.*

I, Richard B. Owen, clerk of the circuit court of the United States for the southern district of Alabama, do hereby certify that the foregoing pages numbered from one to eighty-one, inclusive, contain a full, true, and perfect exemplification of the record and proceedings had in a certain cause lately pending and determined therein, wherein the United States were plaintiffs and George N. Stewart was defendant, as the same remain of record and on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the city of Mobile, this seventeenth day of May, A. D. 1858. [L. S.]

R. B. OWEN,
Clerk C. C. Sou. Dist. Ala.

Filed 8th November, 1858.

493

No. 1. - 2. -

Supreme Court of the United States,

DECEMBER TERM, 1859.

THE UNITED STATES,

VS.

CHARLES LeBARON.

SAME,

VS.

GEORGE N. STEWART.

ARGUMENT FOR DEFENDANT IN ERROR,

BY E. S. DARGAN.

Supreme Court of the United States.

THE UNITED STATES

vs.

CHARLES LEBARON.

SAME VS.

GEORGE N. STEWART.

THESE two cases were before this Court at a former term; and the main question then involved, and the only one decided by the Court, was, that though the bond on its face bears date the first of July, 1850, and the recitals show that Oliver S. Beers was then Deputy Postmaster at Mobile, yet it was competent for the plaintiff to prove by parol *proof*, that the bond was accepted by the Postmaster-General on a subsequent day, and on that day it took effect *as a bond*, and spoke from that day; hence there was no conflict between the recitals in the bond and the parol proof. This is the substance of the *decision*. See it reported in 19 *Howard*.

The question now presented is entirely a different one. It is not whether a bond bearing a particular date can be shown by parol proof to have been delivered, or to have taken effect on a subsequent day; but the question now presented is reduced to this single *point*, whether upon the issue joined and the proof introduced, the verdict should have been for the plaintiff or for the defendant.

The instructions of the Court were, that under the pleading and the proof, the defendant was entitled to

Supreme Court of the United States.

THE UNITED STATES
vs.
CHARLES LEBARON.

SAME VS.
GEORGE N. STEWART.

THESE two cases were before this Court at a former term; and the main question then involved, and the only one decided by the Court, was, that though the bond on its face bears date the first of July, 1850, and the recitals show that Oliver S. Beers was then Deputy Postmaster at Mobile, yet it was competent for the plaintiff to prove by parol *proof*, that the bond was accepted by the Postmaster-General on a subsequent day, and on that day it took effect *as a bond*, and spoke from that day; hence there was no conflict between the recitals in the bond and the parol proof. This is the substance of the *decision*. See it reported in 19 *Howard*.

The question now presented is entirely a different one. It is not whether a bond bearing a particular date can be shown by parol proof to have been delivered, or to have taken effect on a subsequent day; but the question now presented is reduced to this single *point*, whether upon the issue joined and the proof introduced, the verdict should have been for the plaintiff or for the defendant.

The instructions of the Court were, that under the pleading and the proof, the defendant was entitled to

a verdict, although the plaintiff would be entitled to recover under a proper *state* of *pleadings*. This is the substance of the charge given, and presents the only question, growing out of the refusal to charge as requested by the plaintiff.

We must, therefore, look to the pleadings and see the precise issue joined by the parties, and then apply the proof introduced to this issue, in order to ascertain whether the Court erred or not, *in thus ruling*.

The amended declaration describes a bond dated the first day of July, 1850. The two first breaches assigned, show defaults on the 10th July, 1850, the other breaches on the day of the date of the bond. The third plea of the defendant, on which the issue was finally joined, does not deny that Beers was Deputy Postmaster on the first of July, 1850, but asserts that on that day he was acting as such, under an Executive appointment made by the President during the recess of Congress, and that the bond was intended to apply to that term of office. It also denies any default during said term.

The replication to this 3rd plea of the defendant avers the delivery of the bond on the first day of July, 1850, and further, that on and after that day, Beers was not Deputy Postmaster under the Executive appointment as averred in said plea, but that he was then Deputy Postmaster under the appointment made by and with the consent of the Senate, and that said bond was made on the day and date thereof, for the faithful discharge, by said Beers, of the duties of Postmaster under said last appointment, and that the defaults were committed after the making and delivery of said bond, and before the commencement of this suit. To this replication the defendant rejoined that on that day he was Deputy Postmaster under the Executive appointment, and that the bond was given to secure the faithful performance of the duties of that office, on which rejoinder issue was taken.

It is clear that the whole of the pleading, on the part of the plaintiff, affirm, that the bond was given, and that it took legal effect as a bond, on the *first day of July*, 1850, and that Beers held the office of Deputy Postmaster on *that day*, by virtue of his appointment confirmed by *the Senate*. On the part of the defendant he does not deny the execution of the bond on that day, and therefore he *admits* tacitly that it takes legal effect on the first of July, 1850, but *he denies* that on the first of July, 1850, Beers held the office of Deputy Postmaster under the appointment confirmed by the Senate, and insists that on that day he was not Deputy Postmaster under the appointment alleged in the replication, but under the Executive appointment described in the 3rd plea; and also that the bond was intended to apply to the latter and not the former term of office, and on this, issue is taken by the plaintiff.

From the proof it is manifest that the bond did not take effect *as a perfect* obligation on the first of July, 1850, but some time afterwards—that is, when it was accepted by the Postmaster-General. And it is equally clear, that Beers was not Deputy Postmaster under the appointment confirmed by *the Senate*, until the bond was accepted by the Postmaster-General. Therefore, it seems to me, that there could be one response from the Jury—that is, that the plaintiff having failed to prove the substance of the issue submitted to them, their verdict was for the defendant.

This Court held, when these cases were here at a former term, that this bond only took effect from the time it was approved of by the Postmaster-General. The language of the Court is, "our opinion is that this bond speaks from the time it reached the Postmaster-General and was accepted by him; that until that time it was only an offer, or a proposal of an obligation, which became complete and effectual by acceptance; and unlike a Collector's bond, which is

not a condition precedent to his taking office, and may be intended to have a retroactive operation; the bond of a Postmaster cannot be intended to relate back to any earlier date than the time of its acceptance, because it is only after such acceptance that there can be any such holding of the office, as the bond was *intended to apply to.*"

This language of the Court *shows clearly*, that this bond did not take effect on the first of July, for beyond all doubt it had not on that day been accepted; and it *also shows* that Beers could not have been Deputy Postmaster on that day, by virtue of his appointment, confirmed by the Senate, to which the bond, in fact, was intended to apply. Therefore, it is clear that the substance of the issue was not proved, for the substance was, that Beers was Deputy Postmaster under his appointment, confirmed by the Senate, on the first day of July, 1850, and that on that day the bond took effect as a perfect obligation.

If the verdict on this issue could have been for the plaintiff, then the bond would have had relation back, and covered a space of time, which, by law, it could not *cover*, to-wit: the time between its date and its acceptance by the Postmaster-General; and the defendant would have been made liable for defaults of Beers, as Postmaster, before the term of office commenced, for which he bound himself as surety; and he would have been thus bound when the very point or substance of the issue was, that Beers was not Deputy Postmaster on the first day of *July*, 1850, under the *appointment confirmed by the Senate*, and when the proof, beyond all controversy, showed that the bond did not become complete on that day, *nor* was Beers Deputy Postmaster by *virtue of said appointment on that day.*

The entire substance of the issue was, whether Beers was, *on the first day of July*, 1850, Deputy Postmaster under his appointment confirmed by the

Senate, *and* whether he *was or not*, depended on the question whether the bond was accepted *on that day*, and thus become a perfect obligation on the first day of July, 1850. This being the substance of the *issue*, and the proof showing beyond all controversy, that the *bond was not* sent from Mobile to Washington to be accepted until the 2nd or 3rd of July, 1850, and it then taking some five days to reach Washington, there could be no other instructions given than were given by the Court, *that is*, that under the issue joined, the verdict must be for the defendant, although the plaintiff could have recovered under a proper state of pleadings.

In further illustration, that the precise day and date of the bond, and the day on which the office vested in Beers, were both material and of the substance of the issue as framed, let us suppose that the pleader had in his replication alleged the true day on which the bond was *accepted*, and the office, to which it was intended to apply, *vested*—say that he had alleged in his replication that the bond was accepted by the Postmaster-General on the 15th of July, 1850; this replication would have been a clear departure from the declaration. Mr. Gould, in his work on pleading, page 92, section 69, says: "If the plaintiff in an action on a specialty describe it as bearing a particular date, and in his replication aver that it was delivered on a subsequent day, this would be a departure." And in the case of Hall vs. Mathew Denbigh and others, Croke Elizabeth, page 773, the Court asserts the same doctrine. The case was this, the declaration described an *indenture* as bearing date the first of November, (39 Eliz.,) but did not aver when it was *delivered;* after judgment, there was a motion in arrest of judgment, because it was not averred when the deed was delivered; after several arguments, the Court said the declaration was well enough, because it must be intended that the deed was delivered

on the day of its *date*, and further, if it had been delivered on a subsequent day, and so averred in the replication, this would have been a departure."

This principle of pleading must be corrected when applied to such bonds as the one sued on. It is a bond of indemnity covering a specified time, and according to the declaration, replication and the issue *joined*, bearing date from the first day of July, 1850, and covering the time from that day, on which the office *vested;* now a replication showing that the bond took effect on a subsequent day, would be to put up *a different* contract from the contract *described* in the declaration, *for it is one thing* to indemnify against defaults from the 15th of July, and quite a different thing to indemnify against defaults from the first *of July.*

But the plaintiff, by the pleadings, attempted to make the bond cover a space of time that it could not cover in law, and narrowed down the issue to the day on which it was alleged it did take effect, to-wit: on the first of July, 1850. But it could not take effect on that day, and therefore Beers could not on that day have been Deputy Postmaster under the appointment alleged in the replication, to-wit: his appointment confirmed by the Senate. Therefore, the substance of the issue was not *proved* and the verdict ought to have been for the *defendant.*

But it may be urged that as the execution of the bond *was not denied*, and it was averred in our plea, that the bond was intended to apply to the Executive appointment of *Beers*, as Deputy Postmaster, and not the *other*, our parol admission on the trial, that it was the intention of the obligors that the bond should apply to the office held by *Beers* under the appointment confirmed by the Senate, admitted the substance of the *issue.* But that this argument, *if made*, is *erroneous*, will appear from *this view, the bond speaks* in the present tense, *"that Oliver S. Beers is Postmaster,"* and

we know that he could not be Deputy Postmaster at the same time, under both appointments, but as soon as the one took effect, or the instant that the latter term of office took effect, the other was extinguished; he could not hold both at the same time. By admitting the execution, therefore, of the bond, but denying that Beers was Deputy Postmaster under the latter *appointment* at the time of its execution, we put distinctly in *issue the time when* Beers became *invested with the latter office*, and if he did not become Deputy Postmaster under the latter appointment, on the first day of *July*, 1850, *the bond*, if *it took effect* on that day, could not by *law be made to apply* to the latter office, either by parol proof or parol admission, for that would be to change the language of the bond by parol *proof*. This Court admitted *in its decision* in *this* case, *before referred to*, that if this bond had taken effect on the first of July, 1850, during the continuance of the Executive appointment, and before the appointment confirmed by the Senate had vested *in Beers*, then parol proof *to show* that it was the intention of the obligors, that the bond should apply to the latter and not to the former office, could not be received, to contradict the plain language of the bond. See the *decision in* 19 *Howard*. It, therefore, must have been *of the essence of the issue*, that *the new or Senatorial appointment vested* in Beers on the first day of July, 1850, for if it did not so vest on that day, and the bond took effect on that day, (which it is admitted by the pleading that it did) then the bond could not be applied to the last appointment, for that would be to change the legal effect of the bond, by parol proof. See to this point, 1 Barn. & Cress. Rep., 704; 5 Barn. & Cress., 169.

Under the pleadings, the whole substance of the issue was, *did the office of* Deputy Postmaster, conferred on Beers by the appointment confirmed by the Senate, vest in him on the first of July, 1850. This

was the point affirmed on the side of the plaintiff and denied by the defendant, and the evidence was clear and uncontradicted that it *did not* so vest in Beers, on that day, but on a subsequent day. Therefore, it was clear that the substance of the issue was not proved on the part of the plaintiff, *and* the Court could not have instructed the Jury otherwise than *he did.*

In conclusion on this point, it must be remembered that this suit is governed by the rules of the common *law,* and not by the Code of Alabama, which was adopted after the suit was *brought.*

Some other questions are raised by the Bill of Exceptions, touching the admissibility of evidence. First, Beers was offered as a witness, but was objected to, he being the principal obligor in the bond, but not sued in this action; but he was released by the defendant and then permitted to testify. His release clearly rendered him competent.

The defendant then proposed to prove by him, that he had been appointed Deputy Postmaster, at Mobile, by the President, previous to his appointment by and with the advice and consent of the Senate.

To this evidence the plaintiff objected, but upon its being shown that the commission had been burnt by *accident,* the witness was permitted to testify.

There was no error in this, the best evidence was the commission itself, but that being destroyed, secondary proof was admissible. But it was contended that there was a record of the commission at Washington, and this was the best evidence; even if the commission was recorded at Washington, of which the defendant had no knowledge, still that would not render Beers' testimony *illegal,* for such record, if such existed, would be *but secondary evidence,* and there can be no degrees in secondary proof, (unless, indeed, under some peculiar circumstances.) In the case of Doe on the Demise of Gilbert vs. Ross, the original deed was in the possession of one Baxter,

who claimed a lien on it, and on that account refused to produce it; the plaintiff proposed to read an attested copy of the deed, but this not being stamped was rejected; he then proposed to prove the contents of the deed from short hand notes taken on another trial, in which the deed was produced; to this the defendant objected, but the objection was overruled; the case came before the Court of Exchequer, and that Court asserted the rule to be that there were no degrees in secondary evidence, and if a party cannot introduce the original deed, or instrument, he may give parol evidence of its contents, 7 Exchequer Rep. 102; and this decision is certainly in harmony with the English cases. See Rex. vs. Hunt, 3 B. & Ald. Rep. 566; Brown vs. Woodman, 6 C. & P., 206; Hall vs. Ball, 3 Scott, N. R, 577.

I admit that some of the American cases seem to hold, *that there are degrees* in secondary *proof*, and that a lower degree cannot be allowed, if there be a higher degree of secondary evidence in existence; and this may be correct in particular cases, such as these, where the law prescribes that the instrument shall be recorded, and makes such Record evidence, when the original *is lost*. In such a case, the party is charged with a knowledge of the law, and always has the legal right to demand a copy. Hence, he knew of the existence of the copy, and can produce it, and his refusing to do so without any explanation, may subject him to the suspicion of attempting to impose false evidence on the Court; and on the same ground, if it be made to appear that the party has a correct copy of a deed in his possession and he withholds *it*, and attempts to prove the contents of the deed by parol evidence, the Court may reject such parol evidence, because it comes clothed with *suspicion*.

But when the party offering the secondary proof has *none* in his possession, or subject to his control, that is better or more accurate than that which he

offers, there can be no reason for rejecting it. See note to Greenleaf's Evidence, vol. 1, 3d edition, pages 159, 160 and 161, in which the American cases are *cited.*

I do not assert that the English rule, or the correct *rule*, whether English or American, is subject to the qualifications above stated, or to any qualification or exception whatever, but if to any, then I contend it must be the exceptions above stated, and founded on the reason that the defendant being apprised of, and having within his power better secondary proof, attempts to use the inferior degree, or rather that degree more liable to *err*. Limiting the general rule, by this qualification, *can produce no evil*, and may exclude false testimony, when the party offering it had it in his power to produce proof *above* all exception.

But this qualification would not exclude the testimony of Beers as offered. How could the defendant know that the commission *was recorded;* I recollect no act of Congress that requires this commission to be recorded, although it may be the custom to record them. But I do not even *know that.* And again, how was the defendant to produce a copy of the *record?* I know of no law that authorized him to call for a copy, nor any law that required the Postoffice Department to furnish it on his *demand;* and under such circumstances, to exclude parol proof would be to shut out the only proof within his power. It is no answer to this to say, *that copies are furnished* by courtesy or custom when called *for;* it must be shown that the party had the legal power to *produce* the more certain secondary evidence.

But independent of all this, there is another view that would preclude the reversal of the judgment, even if the Court should think that the testimony of Beers on this point was not *admissible.* The third plea upon which the issue was framed, expressly avers that *Beers* was appointed Deputy Postmaster on

the 4th of April, 1849, by the President, during the recess of Congress, which was to continue until the end of the next session of Congress.

The replication does not deny this appointment as alleged in the 3rd plea, but simply denies that he was Deputy Postmaster under it, on the first of July, 1850, and avers that on that day he was Deputy Postmaster under the Senatorial *appointment*, which was made on the 22d April, 1850. This replication not denying the appointment made by the President on the 4th of April, 1849, admits it was so made on that day. Gould's Pleadings, page 152, sec. 167, and authorities there *cited*. Hence, Beers in testifying to the date of his commission, was merely testifying to a fact, which had been admitted by the record. And even if his testimony was inadmissible to prove the fact of the existence of his previous commission, yet *it* could be of no avail to the defendant, nor any injury to the plaintiff, for the fact to which he was testifying had been admitted to be true, and could not have been contradicted. And it is too clear to admit of argument that the admission of even illegal proof to prove a fact, already admitted by the pleadings, is not a *reversable error*, for such evidence not being capable of producing benefit to the one party, nor injury to the other, could have no legal effect at all, and its admission, though technically *erroneous*, would be an *error* without injury, and therefore could not reverse the judgment.

It is also insisted that the Court erred in allowing the endorsement on the back of the bond to be read as evidence. It might be sufficient to say, *that no* injury could have resulted from this, whether the endorsement on the back of the bond was admissible or *not*, because the whole proof showed, beyond doubt, that the bond could not have been accepted by the Postmaster-General before the sixth or seventh of July, 1850, and the same legal result must have *fol-*

lowed, whether it was, in fact, approved by him on the 6th or on the 15th July; and hence this evidence, whether legal or illegal, could not in law have altered the result of the verdict, and hence its admission could not reverse the *judgment*. But we contend that its admission was *strictly legal*. It was clear that the bond was not accepted on the first of July, 1850, and it is also clear that it must have been accepted before it could become *operative*. Therefore, it was proper that the Postoffice Department should keep some note or memorandum of the day *of its acceptance or approval*, which of necessity must have been subsequent to the date of the bond. Now they introduced the bond with a note on the back, indicating when it was *accepted*; it had ever been in the possession of the plaintiff from the time of its receipt by the Postoffice Department, and no evidence was offered to show that this memorandum was made without the consent of the plaintiff. The presumption of law, therefore, is that it was made in the usual course of such *business*, at the time it bears date, and was intended to indicate the time when the bond was accepted, and hence became part of the *res gestæ*, of the acceptance of the *bond*. That such an endorsement is evidence, see Greenleaf's Evidence, vol. 1, 3rd edition, sec. 120, 121, [illegible].

Its admission, however, could by no possibility have worked any injury, for the testimony of Beers, which on this *point* was above all exception, showed, beyond *doubt*, that the bond was not and could not have been approved until some time after its date. And, hence, if this endorsement had never *been read*, no other legal result could have followed from its rejection than must have followed by its being *admitted*. Its admission, therefore, was wholly immaterial in this case, as well *as legal*.

In conclusion, if it should be said that the issue was an immaterial one, and for this a repleader

should be *awarded*, in reply, we say, it was not, and is not, an immaterial issue; on the contrary, it is a material one, but possibly not in accordance with the truth of the facts as disclosed by the *proof*, and, therefore, the plaintiff could not *recover*. A party may have a complete cause of action, but if he does not allege it according to the facts as established by the proof, he cannot *recover*, for his allegations and proof must *correspond;* and if, by taking issue on a false state of facts, he is defeated, he cannot say the issue was an immaterial *one*. An immaterial *issue* is one which, found either way, does not ascertain the truth of the material allegations of the pleadings, and, therefore, a repleader must be awarded after verdict to ascertain the truth of these allegations. See Chitty's Pleadings, pages 691, 692. The issue joined in this case, was on the material allegations of the plaintiff, and hence, the truth of these as alleged has been ascertained.

The District Judge was, therefore, right in instructing the Jury that though the plaintiff would be entitled to recover, if he had declared aright, yet under the issue joined the defendant was entitled to a verdict.

E. S. DARGAN,
Attorney for Defendants.